

1 **BEFORE THE ARIZONA MEDICAL BOARD**

2
3 In the Matter of

4 **KENNETH M. FISHER, M.D.**

5 Holder of License No. 12762
6 For the Practice of Allopathic Medicine
7 In the State of Arizona.

Case No. **NO. 08A-12762-MDX**

**FINDINGS OF FACT, CONCLUSIONS OF
LAW AND ORDER FOR LETTER OF
REPRIMAND**

8
9 On August 6, 2008 this matter came before the Arizona Medical Board ("Board") for
10 oral argument and consideration of the Administrative Law Judge (ALJ) Brian Brendan
11 Tully's proposed Findings of Fact and Conclusions of Law and Recommended Order.
12 Kenneth M. Fisher, M.D., ("Respondent") was notified of the Board's intent to consider
13 this matter on the aforementioned date at the Board's public meeting. Respondent was
14 represented by his attorney, Calvin Raup. Philip Overcash represented the State. Chris
15 Munns, Assistant Attorney General with the Solicitor General's Division of the Attorney
16 General's Office, was present and available to provide independent legal advice to the
17 Board.

18 The Board, having considered the ALJ's report and the entire record in this matter
19 hereby issues the following Findings of Fact, Conclusion of Law and Order.
20

21 **FINDINGS OF FACT**

- 22
- 23 1. The Arizona Medical Board ("Board") is the authority for licensing and regulating the
24 practice of allopathic medicine in the State of Arizona.
 - 25 2. Kenneth M. Fisher, M.D. ("Respondent") is the holder of License No. 12762 for the
practice of allopathic medicine in the State of Arizona.

- 1 3. The Board initiated an investigation of Respondent after it received a complaint filed
2 by patient AM, who claimed that Respondent inappropriately touched him in a
3 sexual manner during an initial assessment for the treatment of opioid addiction.
- 4 4. During the investigation, Board staff discovered evidence that Respondent had
5 prescribed Suboxone tablets to patient AM. Board staff opined that Respondent's
6 prescribing the Suboxone to AM was improper.
- 7 5. Respondent is a family practice physician. He has specialty training in HIV medicine
8 and he is recognized internationally as a clinician in the treatment of HIV disease.
- 9 6. Suboxone is classified as a Schedule III drug by the United States Drug
10 Enforcement Agency ("DEA").
- 11 7. The Drug Addiction Treatment Act of 2000 ("DATA 2000") is federal legislation
12 permitting the treatment of opioid addiction in an office setting by qualified
13 physicians, rather than the traditional opioid treatment program, such as a
14 Methadone Program.
- 15 8. DATA 2000 provides, among other things, that Schedule III medications can be
16 used in an approved physician's office to treat addiction if the United States Food
17 and Drug Administration has approved the medication for such use.
- 18 9. In order to prescribe Suboxone, a physician must receive a waiver from the DEA.
- 19 10. A physician seeking to obtain a DEA waiver to prescribe Suboxone must
20 successfully complete an approved training course. The course content is based
21 upon the Substance Abuse Mental Health Service Agency 2004 publication
22 Treatment Protocol number 40, Buprenorphine treatment for opioid addiction.
- 23 11. The DEA waiver is the same for all approved physicians, regardless of their
24 specialty. The requirements are similar for allopathic and osteopathic physicians.¹
25 Therefore, the standard of care applies for all approved physicians.
12. A physician who obtains a DEA waiver to prescribe Suboxone receives an "X"
number for use in prescribing the medication.

¹ The Board's expert at the hearing was Dr. Carol Peairs, M.D., an allopathic physician who is board certified in anesthesiology with a subspecialty board certification in pain medicine. Respondent's expert was Dr. Steven Charles Boles, D.O., an osteopathic physician who is board certified in family medicine and addiction medicine. Drs. Peairs and Boles possess DEA waivers for Suboxone. Dr. Boles has taught approved training courses for obtaining Suboxone waivers.

- 1 13. On November 10, 2005, AM presented to Respondent to discuss possible
2 treatment for opioid addiction following a previous surgery.
- 3 14. On November 10, 2005, Respondent had a DEA waiver to prescribe Suboxone.
- 4 15. AM was employed as an emergency medical technician at John C. Lincoln Hospital.
- 5 16. Respondent's practice was to use Suboxone-identified forms when treating patients
6 for opioid addiction involving the use of Suboxone. Respondent used the forms
7 provided by the Suboxone training course he had successfully completed.
- 8 17. During his visit with Respondent and his staff, AM was reluctant to have his
9 information documented on the Suboxone forms.
- 10 18. There is credible evidence that Respondent documented his examination of AM
11 using a one-page physical form available in the examination room.
- 12 19. One of Respondent's medical assistants wrote on AM's med list that he was taking
13 40 milligrams of Oxycontin daily. At the hearing, Respondent credibly testified that
14 the patient was taking that dosage six to eight times daily.
- 15 20. Respondent's physical examination of AM found no evidence of hyperhidrosis or
16 anything warranting the patient's use of Oxycontin for pain management
- 17 21. AM would not disclose the source of his Oxycontin supply to Respondent.
- 18 22. Respondent's treatment plan for AM was the Buprenorphine program. AM was
19 surprised that the program would involve counseling.
- 20 23. AM was presented with a contract by Respondent for the Buprenorphine program.
21 AM wanted to re-read the contract because he had concerns with the provisions
22 that would permit Respondent to discuss AM with his counselors and family.
- 23 24. When treating a patient with Suboxone, the standard practice is to have the patient
24 experiencing opioid withdrawal. The physician then administers the Suboxone
25 incrementally to the patient until an effective optimal dosage is achieved.
- 25 25. Suboxone can be delivered to a patient either by the approved physician's office, if
the physician has a dispensing license, or by prescription which is filled by a
pharmacy with the patient returning to the physician with the medication for dosage
treatment.
26. Respondent did not begin treatment of AM that day for several reasons. First, he
did not sign the treatment contract indicating his consent to the treatment program.

- 1 AM indicated to Respondent that he wanted to think about the terms and conditions
2 of the treatment program. Second, he had used Oxycontin that day and, therefore,
3 could not achieve the state of withdrawal necessary to determine the optimal
4 dosage of Suboxone.
- 5 27. Respondent did not have a dispensing license. Therefore, he wrote a prescription of
6 Suboxone to AM with the expectation that AM would return to his office the next day
7 for treatment to establish an optimal dosage.
- 8 28. Respondent prescribed Suboxone to AM even though AM had not consented to
9 entering into the treatment program. Respondent should not have prescribed the
10 medication until AM consented to the treatment program's terms and conditions.
11 Furthermore, Dr. Boles testified that Respondent's records did not adequately
12 reflect information necessary to establish whether patient AM was addicted to
13 opioids.
- 14 29. AM did not return to Respondent with the prescribed Suboxone to establish the
15 optimal dosage for treatment. It is unknown what AM did with the Suboxone
16 prescribed to him by Respondent.
- 17 30. AM was left alone in the Respondent's examination room with AM's chart. When
18 the Board reviewed the chart, it did not find documentation of Respondent's
19 examination of the patient. There is no evidence of the standard of care for leaving
20 a patient alone in an examination room with his or her chart. There is credible
21 evidence that Respondent did document his examination of AM, but such
22 documentation was not in the file examined by Board staff. Respondent failed to
23 safeguard the contents of AM's chart. Apparently, neither Respondent nor his
24 medical assistant reviewed the file after Respondent's examination of AM. In light
25 of the reluctance of AM to permit documentation of his examination, Respondent
should have made assurances that his examination of AM was preserved in the
chart.
31. There is no evidence that Respondent crossed sexual boundaries with AM, which
was the allegation that initiated the Board's investigation in this matter. This finding
is made by the Administrative Law Judge even though Respondent was not
charged with the violation.

CONCLUSIONS OF LAW

1. The Board has jurisdiction over Respondent and the subject matter in this case.
2. Pursuant to A.A.C. R2-19-119(B), the Board has the burden of proof in this matter. The standard of proof is preponderance to the evidence. A.A.C. R2-19-119(A).
3. Respondent did not violate the provisions of A.R.S. § 32-1401(27) (a), specifically 21 U.S.C. 823(g), Control Substances Act, as alleged in the Board's Complaint.²
4. Respondent did violate the provisions of A.R.S. § 32-1401(27) (e). The factual basis for this conclusion is Respondent's failure to protect his notes contained in AM's chart. The Administrative Law Judge concludes that Respondent's explanation for the missing documentation of his examination of AM to be credible, but not excusable. It is unclear why AM was left alone in the examining room with his chart, especially since the patient was extremely reluctant to allow Respondent to document his examination.
5. Respondent violated the provisions of A.R.S. § 32-1401(27) (q). While the standard of care permits an authorized physician to initially prescribe Suboxone with the intent that the patient later return to the physician in a state of withdrawal so that incremental dosages of Suboxone could then be administered to achieve the optimal dosage, Respondent violated that standard of care by prescribing Suboxone to AM before he agreed to the terms and conditions of the treatment program. AM was illegally taking Oxycontin for pleasure not pain relief. He did not have a prescription for Oxycontin, a controlled medication. AM expressed reluctance to the terms and conditions of the treatment program. Nevertheless, Respondent prescribed Suboxone to AM with the expectation that he would consent to the treatment program and return to his practice with the prescribed medication to determine optimal dosage. AM did not return to Respondent's practice after receiving the prescription for Suboxone. AM had access to the prescribed Suboxone, which he could obtain and take without medical supervision.

² Counsel for the Board withdrew the allegation of violations of A.R.S. § 32-1401(27)(a).

1 **ORDER**

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3 Based on the Findings of Fact and Conclusions of Law as adopted, the Board
4 hereby issues a Letter of Reprimand in Board Case No. MD-06-0323A against License
5 No. 12762, previously issued to Kenneth M. Fisher, MD.

6 It is further ordered that Respondent pay the costs of hearing, not to exceed \$20,000.

7 **RIGHT TO PETITION FOR REHEARING OR REVIEW**

8 Respondent is hereby notified that he has the right to petition for a rehearing or review by
9 filing a petition with the Board's Executive Director within thirty (30) days after service of
10 this Order. A.R.S. § 41-1092.09. The petition must set forth legally sufficient reasons for
11 granting a rehearing. A.C.C. R4-16-102. Service of this order is effective five (5) days
12 after date of mailing. If a motion for rehearing is not filed, the Board's Order becomes
13 effective thirty-five (35) days after it is mailed to Respondent.

14 Respondent is further notified that the filing of a motion for rehearing is required to
15 preserve any rights of appeal to the Superior Court.
16

17 Dated this 8th day of August 2008.

18
19 ARIZONA MEDICAL BOARD

20 (SEAL)



By: 

Lisa Wynn
Executive Director

1 Original of the foregoing filed this
2 8th day of Aug, 2008, with:

3 Arizona Medical Board
4 9545 East Doubletree Ranch Road
5 Scottsdale, AZ 85258

6 COPY OF THE FOREGOING FILED
7 this 8th day of Aug, 2008:

8 Cliff J. Vanell, Director
9 Office of Administrative Hearings
10 1400 W. Washington, Ste 101
11 Phoenix, AZ 85007

12 EXECUTED Copy of the foregoing
13 Mailed by Certified Mail this
14 8th day of Aug, 2008, to:

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